2012 IL App (5th) 110371-U

NO. 5-11-0371

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

KATHERINE M. COMPTON, n/k/a Katherine M. Kelly,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellee,	)	Jackson County.
	)	
v.	)	No. 05-D-195
	)	
STEPHEN L. COMPTON,	)	Honorable
	)	Kimberly L. Dahlen,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's order allowing removal of a child was against the manifest weight of the evidence where the anticipated benefits to the custodial parent and child were uncertain.

¶ 2 The respondent, Stephen L. Compton, appeals an order of the trial court granting a petition to remove his minor child from the state. The court found that the proposed move to New York State would enhance the quality of life of both the custodial parent (petitioner Katherine M. Compton) and the child, largely due to the benefits of a job the petitioner anticipated she would be offered. On appeal, the respondent argues that the court's findings were against the manifest weight of the evidence. We reverse.

¶ 3 The parties, Stephen L. Compton (Steve) and Katherine M. Compton, now known as Katherine M. Kelly (Kate), had one son together during their marriage. Kate was awarded sole custody of their son, Ben, and Steve was awarded visitation. Pursuant to the court-ordered visitation schedule, Ben spent three weekends every month with

Steve. Weekend visits began at 6 o'clock on Friday evenings and ended at 6 o'clock on Sunday evenings. The schedule also called for the parties to alternate holidays with Ben.

¶ 4 Ben was six years old when Kate filed the petition to remove a child from the State of Illinois that is at issue in this appeal. Kate sought to move with Ben from Carbondale, Illinois, to a suburb of Buffalo, New York, because her family lived near Buffalo and she believed that there were better job opportunities for her there than in Carbondale.

¶ 5 At a hearing on her petition for removal, Kate testified that she had worked in her current position at the Women's Center in Carbondale for approximately 1 year, although she had worked at the Women's Center for a total of 10 years. She explained that after nine years of working as an adult counselor in the center's rape crisis services program, she began to experience severe burnout. She therefore switched jobs to her current position as a children's counselor. Kate further testified that she earned $27,000 per year at the Women's Center with no room for professional advancement. She had looked for other work in Carbondale, but had not been able to find any jobs for which she was qualified. She stated that she had not even been offered an interview.

¶ 6 Kate testified that she began looking for work in Rochester, New York, because working there would allow her to live near her parents and her sister. Her sister lives in Rochester, and her parents live in nearby Sodus Point. However, Kate found that the job market in Rochester was no better than the market in Carbondale. She then expanded her search to Buffalo, which is a little more than an hour's drive from Rochester. She testified that once she expanded her search to Buffalo, she got two job interviews right away. One was for a position with Geico Insurance Company.

Although the $29,000-per-year salary would be only slightly higher than her salary in Carbondale, she testified that the job offered more benefits and room for advancement than her current position. Kate testified that she did not have a job offer from Geico at the time of the hearing. However, she had a "final interview" scheduled for the week following the hearing, and she believed that she had a good chance of being offered the job.

¶ 7 Kate testified about Snyder, New York, the Buffalo suburb where she wanted to live with Ben. She stated that Snyder was 15 minutes outside the city of Buffalo. She stated that the schools there were comparable to the schools in Carbondale, and the cost of living was slightly lower than in Carbondale. She further testified that there were ample cultural activities available for Ben in the Buffalo area, including music, theaters, museums, and even a children's theater. She testified that it took just under two hours to drive from Snyder to her parents' home in Sodus Point and just over an hour to her sister's home in Rochester.

¶ 8 Steve testified that his entire family lives in Carbondale or southern Illinois, including his grandmother, parents, sister, and two uncles. He testified that Ben sees his extended family regularly, including family gatherings at his grandmother's home on Sundays. He testified that Ben sees Steve's parents at least once a month during the weekends Ben spends with Steve. Both parties testified that, in addition to the court-ordered visitation schedule, Ben spends a few hours with Steve every Wednesday afternoon. Steve testified that this arrangement began approximately one year before the hearing. In addition, he testified that he often attends school programs and parent-teacher conferences, and that he went on at least one school field trip with Ben.

¶ 9 The court granted Kate's petition for removal. In its written order, the court found that the move would enhance Ben and Kate's quality of life for two reasons. First, the

court found that Kate would be happier and more fulfilled living near her family and working in a job with room for professional advancement. The court explained that these benefits to Kate would also provide an indirect benefit to Ben. In addition, the court found that the cultural opportunities available for Ben to enjoy in Buffalo would be only 15 minutes away from Snyder.

¶ 10 The court further found that neither party had improper motives in requesting or opposing the move, and that Steve had been an involved and loving father. The court found that a reasonable visitation schedule was possible, and it awarded Steve visitation during school breaks as follows: four days over Thanksgiving vacation, eight days over Christmas vacation, one week during a school vacation in February, and one week during a school vacation in April. The court also ordered visitation for Steve beginning one week after school ended (late in June) until one week before school began (early in September). The court explained that this would be a reasonable schedule because it would give Steve longer uninterrupted visits with Ben, even though the visits would be less frequent. The court also noted that the schedule would allow Steve to spend all major holidays with Ben. Steve then filed the instant appeal.

¶ 11 Courts may allow a parent to remove a child from the State of Illinois if they find that the proposed move is in the best interests of the child. 750 ILCS 5/609 (West 2010). The primary consideration in removal cases is the child's best interest. *In re Marriage of Eckert*, 119 Ill. 2d 316, 325, 518 N.E.2d 1041, 1044 (1988). The custodial parent has the burden of proving that the proposed move is in the child's best interest. 750 ILCS 5/609 (West 2010).

¶ 12 The best-interests determination is not susceptible to a "simple, bright-line test." *In re Marriage of Eckert*, 119 Ill. 2d at 326, 518 N.E.2d at 1045. Instead, the

determination depends on the unique circumstances of each case. *In re Marriage of Eckert*, 119 Ill. 2d at 326, 518 N.E.2d at 1045. Our supreme court has identified five factors to help trial courts make this determination. Courts should consider (1) the likelihood that the move will enhance the quality of life for the child and the custodial parent, (2) the motives of the custodial parent in seeking to remove the child and whether removal is merely a ruse to interfere with visitation, (3) the motives of the noncustodial parent in opposing removal, (4) the visitation rights of the noncustodial parent, and (5) whether a realistic and reasonable visitation schedule can be reached if the move is allowed. *In re Marriage of Eckert*, 119 Ill. 2d at 326-27, 518 N.E.2d at 1045-46.

¶ 13 On appeal, we will reverse a trial court's order granting or denying a petition for removal only if the court's findings are against the manifest weight of the evidence and the order results in manifest injustice. *In re Marriage of Collingbourne*, 204 Ill. 2d 498, 521-22, 791 N.E.2d 532, 545 (2003). The reason for this highly deferential standard of review is our recognition that the trial court had the opportunity to observe the child and both parents, thereby giving that court a superior ability to assess their personalities and temperaments and evaluate the child's needs. *In re Marriage of Collingbourne*, 204 Ill. 2d at 522, 791 N.E.2d at 545. This deference, however, is not unlimited. If a decision in a removal case is against the manifest weight of the evidence, it will be reversed. *In re Marriage of Krivi*, 283 Ill. App. 3d 772, 775, 670 N.E.2d 1162, 1165 (1996).

¶ 14 We first consider the likelihood that the move will increase the quality of life for both the child and the custodial parent. *In re Marriage of Eckert*, 119 Ill. 2d at 326-27, 518 N.E.2d at 1045. In considering this factor, we are mindful that our supreme court has stated that the best interest of a child "cannot be considered without

assessing the best interests of other members of the household in which the child resides, most particularly the custodial parent." *In re Marriage of Collingbourne*, 204 Ill. 2d at 526, 791 N.E.2d at 547. We are also mindful that Kate, as the parent seeking removal, bears the burden of proving that the move will, in fact, be in Ben's best interest. 750 ILCS 5/609 (West 2010); *In re Marriage of Collingbourne*, 204 Ill. 2d at 529, 791 N.E.2d at 549. To meet this burden, she must demonstrate that the move will benefit Ben, not merely that it will not harm him. See *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶ 45-50, 964 N.E.2d 756, 768-69, (upholding a trial court's finding that a move would not improve the children's quality of life where the residences, school districts, and other factors were comparable). We agree with Steve that Kate has failed to meet this burden.

¶ 15 The primary benefits relied upon by Kate included the benefits of the Geico job, the proximity of Kate's family, and the availability of more cultural activities for Ben. To the extent Kate relies on the position with Geico to show that the move will enhance her and Ben's quality of life, we find that she has failed to meet her burden for two reasons. First, her salary would only increase by $2,000 per year. This is an insignificant amount. Although Kate also testified that the cost of living was slightly lower in Snyder than in Carbondale, the difference was not significant. Moreover, economic benefits alone are insufficient to support a finding that a proposed move will benefit a child, at least where there is no evidence that the custodial parent's increased earning capacity will have an impact on the child's quality of life. See *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶ 49, 964 N.E.2d at 769 (noting that a higher salary alone is insufficient to weigh in favor of removal where the custodial parent had no difficulty meeting the needs of her child with the salary she earned at her position in Illinois).

¶ 16 More significantly, however, Kate had not been offered the position with Geico. Thus, any benefit at all to be derived from the position was uncertain. Moreover, while Kate testified that there was more room for advancement with Geico, there was no evidence as to how quickly she might advance. As such, even if we were to assume she would be offered the position, the extent to which it might enhance her and Ben's quality of life was speculative.

¶ 17 In that regard, this case is similar to *In re Marriage of Johnson*, 277 Ill. App. 3d 675, 660 N.E.2d 1370 (1996). There, the custodial parent sought to move to Texas with the child. The trial court specifically found that, while the proposed move *should* benefit the child, the court did not know whether it *would* do so. *In re Marriage of Johnson*, 277 Ill. App. 3d at 681, 660 N.E.2d at 1374. In reversing the trial court's decision to allow removal, this court highlighted this finding. We explained that it was "clear, from the trial court's statements, that there [was] some uncertainty as to whether [the child's] quality of life [would] actually be enhanced." *In re Marriage of Johnson*, 277 Ill. App. 3d at 681, 660 N.E.2d at 1374. We acknowledge that here, unlike there, the trial court found that the move would definitely enhance Ben's quality of life. However, to the extent the court relied on the benefits of the position Kate hoped to obtain with Geico, we do not believe the conclusion was supported by the evidence. A custodial parent seeking to move out of state with a child must demonstrate at least some benefit to the child that is certain rather than speculative.

¶ 18 However, we must also consider the evidence that the move will enhance Ben's quality of life due to the proximity of Kate's family and the cultural opportunities available to Ben. See *In re Marriage of Collingbourne*, 204 Ill. 2d at 528, 791 N.E.2d at 548-49 (explaining that trial courts must also consider noneconomic benefits). Kate

testified that her parents and sister live within a two-hour drive from Snyder. See *In re Marriage of Krivi*, 283 Ill. App. 3d at 777, 670 N.E.2d at 1166 (noting that a child has an interest in maintaining contact with " 'both parents, as well as with other family members' " (quoting *In re Marriage of Stone*, 201 Ill. App. 3d 238, 243, 559 N.E.2d 92, 95 (1990))). While there is a benefit to Ben in being able to see his aunt and grandparents more frequently, this benefit is offset to a large extent by the fact that the move will mean far less frequent contact with his numerous relatives on Steve's side of the family who live in Illinois. In essence, Ben would be increasing his contacts with one set of relatives at the expense of his contact with another set of relatives. This would appear to be an equal exchange, not an enhancement in his quality of life. See *In re Marriage of Demaret*, 2012 IL App (1st), 111916, ¶ 46, 964 N.E.2d at 768.

¶ 19 We must also emphasize that although Kate's parents and sister live *near* Buffalo, they are not local. By contrast, the evidence showed that Steve's extended family lived either in Carbondale or near enough to see Ben on a regular basis. Steve testified that his family had weekly gatherings at his grandmother's home, where Ben was able to play with cousins who were close to his age. The adverse impact the move might have on these important relationships cannot be overlooked. See *In re Marriage of Johnson*, 277 Ill. App. 3d at 683, 660 N.E.2d at 1376.

¶ 20 Finally, we note that while there was uncontroverted testimony that there were more cultural activities available for Ben in the Buffalo area than in Carbondale, there was very little evidence about the extent to which six-year-old Ben would take advantage of those opportunities. While these activities are likely to enhance Ben's quality of life to some degree, we do not believe they are sufficient to support the court's order in light of our consideration of the other applicable *In re Marriage of*

Eckert factors.

¶ 21 We next consider the motives of the custodial parent in requesting removal and the motives of the noncustodial parent in opposing the move. *In re Marriage of Eckert*, 119 Ill 2d at 327, 518 N.E.2d at 1045. The trial court found that the motives of both parties here were proper. This finding was amply supported by the record. Thus, we need not address these factors. See *In re Marriage of Johnson*, 277 Ill. App. 3d at 681, 660 N.E.2d at 1375.

¶ 22 The last factors we consider are the noncustodial parent's visitation rights and whether a reasonable visitation schedule can be arranged if the move is allowed. *In re Marriage of Eckert*, 119 Ill. 2d at 327, 518 N.E.2d at 1045-46; see also *In re Marriage of Johnson*, 277 Ill. App. 3d at 681, 660 N.E.2d at 1375 (noting that these two factors may be considered together). Here, there is no question that Steve is a loving and involved father who has diligently exercised his visitation rights. Thus, courts should be reluctant to interfere with those rights absent compelling reasons to do so. *In re Marriage of Eckert*, 119 Ill. 2d at 327, 518 N.E.2d at 1046.

¶ 23 Allowing removal will always have some adverse impact on visitation. The question thus becomes whether a *reasonable* schedule can be created. *In re Marriage of Sale*, 347 Ill. App. 3d 1083, 1089, 808 N.E.2d 1125, 1129 (2004). A reasonable visitation schedule is one that fosters and preserves the child's relationship with both parents. *In re Marriage of Eckert*, 119 Ill. 2d at 327, 518 N.E.2d at 1046.

¶ 24 The visitation schedule the court ordered here reduces the amount of court-ordered visitation from approximately 112 days per year to approximately 88 days per year. The schedule also means that there will be gaps of 2 to 2½ months between visits. As the trial court noted, however, the schedule will also allow Steve to have more uninterrupted time with Ben and to spend all major holidays with him.

Although these features may offset the drawbacks of the schedule to some extent, we do not believe they are sufficient under the facts of this case. With Ben living in Carbondale, Steve is able to attend school functions and spend additional time with Ben every Wednesday afternoon. If the move is allowed, he will no longer be able to do so.

¶ 25 The proposed visitation schedule might be reasonable if Steve were less diligent in exercising his visitation rights or if other factors weighed more heavily in favor of allowing the move. However, under the circumstances of this case, we find that it is not reasonable. See *In re Marriage of Collingbourne*, 204 Ill. 2d at 523, 791 N.E.2d at 546 (explaining that courts must weigh and balance the *In re Marriage of Eckert* factors); *In re Marriage of Johnson*, 277 Ill. App. 3d at 682, 660 N.E.2d at 1375 (finding a visitation schedule unreasonable "[i]n light of" a father's " 'extraordinary involvement' " in his daughter's life).

¶ 26 Considering all of the relevant factors, we conclude that the decision to allow removal was against the manifest weight of the evidence. We therefore reverse the trial court's order.

¶ 27 Reversed.